No. 82-1422

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT J. ADAMS, MERREDNA T. BUCKLEY, WILLIAM J. CALLOWAY, JAMES JOSEPH CONNELL, ANTHONY MICHAEL COSELLA, JOHN R. COOK, ANNE CROWLEY ON BEHALF OF THE ESTATE OF WILLIAM J. CROWLEY, DECEASED, KATHRYN M. CULLEN, ANGELINA A. DICARLO, ROCCO DELGRAMMASTRO, KATHLEEN DIEHL AS EXECUTRIX OF THE ESTATE OF JOHN M. DILLENSCHNEIDER, DECEASED, WANDA A DOMAROTSKY, FRANK A. DREGAR, ROBERT J. EBY, AMANDA FAY, MARTHA FLINN, THOMAS E. FLOOD, CORNELIUS FRAZIER, JR., MARY GERACE, ROSE T. GUOKAS, JOHN GUY, MARY F. HABINA, JAMES HICKMAN, JOHN HUDSON,

(Additional Petitioners inside cover)

vs.

GOULD INC. and FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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(Continued from front cover)

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Petitioners,

Questions Presented

I. Does the principle of *res judicata* bar claims by vested pensioners for failure to pay pensions where the earlier litigation was a union initiated grievance in arbitration alleging the company underfunded the pension fund and where:

(a) The arbitrator decided only that the company was liable and directed the company and union to negotiate the amount of the underfunding and place it in the pension fund;

(b) The union and company decided not to complete the arbitration but instead entered into a purported settlement agreement;

(c) The agreement was entered into without authority from vested pension beneficiaries or notice to them or opportunity to be heard;

(d) The agreement does not conform to the arbitrator's award. It does not place the admitted $570,600 underfunding into the pension fund;

(e) The agreement divests vested beneficiaries of their right to participate in the $570,600 amount of underfunding;

(f) The agreement does not deal with the specific pension entitlements of petitioners;

(g) The trustee of the pension plan is not a party to the arbitration or the agreement?

II. Did the court of appeals make numerous errors in reversing the district court's denial of summary judgment with the result that sixty-two petitioners are denied judicial review of denial of vested pensions?

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RULE, STATUTORY PROVISIONS AND TEXTS:

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ROBERT J. ADAMS, *et al.*,

Petitioners,

vs.

GOULD INC. and FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on September 2, 1982.

Opinions Below

On May 12, 1981, the United States District Court for the Eastern District of Pennsylvania issued an interlocutory order, with opinion, denying respondents' motion for summary judgment. This opinion is unreported and appears at A15.

On September 2, 1982, the United States Court of Appeals for the Third Circuit, on interlocutory appeal of a certified question, entered judgment, with opinion, reversing the order of the District Court and directing the entry of summary judgment against petitioners. This opinion is reported at 687 F.2d 27. It appears at A1.

Jurisdiction

The judgment of the Court of Appeals was entered on September 2, 1982 (A33), and rehearing was denied on September 27, 1982 (A35). On December 13, 1982, this court issued an order extending the time for filing a petition for writ of certiorari to February 24, 1983. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statement of the Case

1. Nature of the Case

This is an action brought by 62 former employees of Gould, Inc. ("Gould"), a multibillion dollar manufacturing concern. Petitioners' employment with Gould terminated in 1974 when Gould closed down its Wilkening Plant where they worked. Petitioners all had vested retirement rights under a Gould employees pension plan by virtue of 10 years or more of credited service with

Gould. Since the termination of their employment, Gould has denied any pension obligations to them. The trustee of their pension fund has refused to pay them pensions as they reach age 55 when payments are due.

The Amended Complaint asserts claims against Gould for breach of its contractual obligations under the pension plan and for fraud in its inducing petitioners to remain in its employment by manifesting that they would secure pension benefits, while withholding its intention to deny them any benefits. A claim is made against defendant First Trust Company of St. Paul, Minnesota ("First Trust"), the trustee of the pension fund involved, for breach of its fiduciary duty in refusing to pay pension benefits when due.

Jurisdiction is invoked, *inter alia*, under 29 U.S.C. §185 of the National Labor Relations Act, granting jurisdiction for suits arising out of violations of labor contracts; under 28 U.S.C. §1332, granting jurisdiction where the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs and is between citizens of different states; and, under the pendant jurisdiction of the court to consider claims arising under state law.

2. Relevant Facts

In 1974, Gould closed down its Wilkening plant where petitioners were employed and terminated their employment. Workers at the Wilkening plant were covered under a Gould company-wide hourly-employee pension plan. This plan provided *inter alia* that persons who had vested pension rights by virtue of 10 years or more of credited service were entitled to be paid pensions upon reaching age 55 in the event that their employment was terminated by Gould. Petitioners, most of whom had

spent their entire working lives at the Wilkening plant, had vested pension rights at the time of their job termination.

In connection with closing the Wilkening plant, Gould took the position that the pension fund allocable to the Wilkening employees was insufficient to continue full pensions to those who were already retired and drawing pensions (the retired pensioners). It directed First Trust to reduce pension payments to the retired pensioners. Local 416 of the United Automobile Workers ("the Union"), the collective bargaining representative of the Wilkening workers, filed a grievance stating that Gould had violated the Collective Bargaining Agreement because of its failure to provide full pensions to all employees who had a vested right to a pension under the Gould pension plan, and requesting that the company pay all eligible employees the full amount of pensions that they were entitled to under the plan. This grievance was ultimately submitted to a single arbitrator under Article XVII of the Collective Bargaining Agreement.

In proceeding to resolve the pension dispute, pursuant to Article XVII, a generalized grievance procedure, Gould and the Union ignored Article XII of the Collective Bargaining Agreement which contained a specific procedure for pension plan disputes:

> ARTICLE XII
>
> Pension Plan
>
> "... A board composed of 1 employee and 1 management member shall be established at the Union group location *to settle any differences or disputes* regarding the application of provisions of the plan to employees including differences or disputes concerning any extention of retirement date. The board shall also include an impartial chairman chosen by its members . . . (emphasis added)"

The generalized grievance procedure under Article XVII had a finality provision. The pension dispute grievance procedure under Article XII did not.

On November 24, 1975, the arbitrator issued his opinion and award. He found, *inter alia*, that the company had breached the pension agreement by failing to fund the pension plan on a sound actuarial basis. Under the terms of the award, the company was directed to make further contributions to the pension fund, to be calculated on the basis of the actuarial assumptions that were in effect at the end of 1968. The award provided in material part:

> "5. The Company is directed to make further contributions to the fund, using to calculate them the assumptions that were in effect at the end of 1968. These shall be in addition to the contributions already made.
>
> "6. These additional contributions shall be for the period when the changed assumptions were made effective after 1968 until the Plan terminated.
>
> "7. In the event of diagreement concerning the amount of these additional contributions, the Company's and the Union's actuaries shall negotiate the sums. If they cannot agree, their contentions in writing shall be forwarded to me and I will make the determination."

Gould and the Union by negotiation arrived at $570,600 as the additional contribution required by the award. On March 15, 1977, they entered into a lengthy written agreement (the agreement) purporting to "settle" the claim in arbitration, but actually deviating from the arbitration award. *This agreement did not conform to the arbitrator's award. Under their agreement no money was put into the common pension fund or into any other*

fund. Instead, Gould agreed to pay specified increased monthly pension payments only to persons who had already retired from employment with Gould prior to the closing of the Wilkening plant who were named on Schedule A attached to the agreement.

The agreement provided:

> "WHEREAS, Gould and the (union) agreed that it would be fair and equitable for Gould *to provide certain additional retirement benefits to certain (union) members who had retired from service with Gould at its Wilkening plant prior to the date on which the Wilkening plant was closed* . . . Gould agrees to pay each individual who is listed on Schedule A (the retired pensioners) a monthly benefit . . ." (emphasis added)

Schedule A established fixed additional monthly pension payments for each person listed, which were subject to limited upward adjustment based on the performance of a hypothetical fund amounting to $570,600. Petitioners and the other members of the class of active employees that had vested pension rights, at the time of the plant closing, were not entitled to any benefit under the agreement. In fact, the agreement divested them of their rights to participate in the $570,600 admitted underfunding of their pension fund.

The signing of this agreement was entirely unauthorized by petitioners who had not been members of the Union since termination of their employment in 1974. The president of the Union signed the agreement without convening a membership meeting and without taking a vote on the subject or receiving any other type of authorization from the petitioners. There was no evidence showing any basis of authority of the Union or its president to act on behalf of the petitioners or the

other former employees, three years after the termination of their employment and a year and one half after the arbitrator's decision. The agreement contained a release provision:

> "The acceptance and execution of this Agreement by Gould and the (union) shall constitute a full and complete release and discharge of any and all rights, claims, and obligations which Gould may have with or against the (union), and which the (union), as the exclusive collective bargaining representative of those employees and former employees of Gould which are its members, may have with or against Gould, with respect to the closing of the Wilkening Plant and the termination of the Wilkening Pension Plan, including without limitation, any rights, claims, or obligations arising out of that certain opinion of Arbitrator John Perry Horlacher dated November 24, 1975."

Gould and the Union never returned to the arbitrator and their agreement has never been embodied in the arbitrator's decision.

After their employment termination, certain petitioners reached age 55, when pension payments were due. These persons have been denied any monthly pension payments despite due demand.

3. Proceedings in the Lower Courts

Respondents moved for summary judgment in the district court on the grounds that the action was barred by the arbitration and agreement; and, that the action was barred by the applicable statute of limitations of the Commonwealth of Pennsylvania (5 P.S. §173), relating to the time provided to seek to modify, correct or vacate an arbitration award. Petitioners raised a number of defenses in the briefs that were filed in the district court,

including that the union's entering into the agreement constituted a breach of its duty of fair representation of petitioners.

In his decision denying defendants' motion, the district judge found that the Union and Gould had (A27):

> "... impermissibly engaged in a negotiation endeavor which resulted in the divestiture of the pension rights. As a consequence, because the plaintiffs did not consent, the settlement and release are inapplicable as a bar to the present action."

The district judge noted, in his opinion, other defenses raised by petitioners without addressing them.

The district judge denied defendant's request for reconsideration. He then granted their request for certification of interlocutory appeal pursuant to 28 U.S.C. §1292(b). The court of appeals granted appeal of the certified question:

> "Whether [plaintiffs] are bound by the results of the arbitration between Gould and their collective bargaining representative and thereby barred from this suit."

Petitioners raised in their brief, in the court of appeals, all the replies that they had raised in the district court, including:

1. that the agreement was unauthorized;

2. that it affected petitioners' vested rights without their consent;

3. that petitioners received no consideration under the agreement;

4. that the union breached its duty of fair representation of petitioners in entering into the agreement;

5. that pension dispute resolution procedures under the collective bargaining agreement were not intended to be final and binding;

6. that petitioners claim of fraud could not be barred;

7. that petitioners claims of being denied pensions at reaching age 55, at the least, entitled them to an accounting and a judicial determination of their specific pension entitlements from First Trust.

Petitioners further requested that the court of appeals direct the entry of partial summary judgment against Gould on its own admission that it underfunded the pension fund by $570,600.00 and failed to follow the arbitrator's direction to place this money in the fund.*

In its decision, the court of appeals reversed the order of the district court denying summary judgment. It held:

1. That the district judge erred in following *Hauser v. Farwell, Ozmond, Kirk & Company*, 299 F. Supp. 387 (D. Minn. 3rd Div. 1969), holding that a union cannot bargain away accrued or vested rights of its members without their consent. The court of appeals found *Hauser* irrelevant to this case, since it found that this case involved arbitration, a method of adjudication, rather than negotiation and that the Union and Gould in their agreement signed a year and one half after the arbitration (A7):

> "... merely implemented the arbitrator's award in all its sophisticated ramifications, performing the calculations he had ordered."

---

* Citing Moore, *Federal Practice and Procedure*, 2d Ed., Vol. 6, page 337, which provides a basis for a court of appeals to direct summary judgment against the moving party on the basis of that parties own admission.

2. That the Union and Gould properly chose arbitration under Article XVII of the Collective Bargaining Agreement despite the specific procedure under Article XII for resolving disputes about pensions because, *inter alia* (A12 and A13):

> "The very structure of the Article XII board—one employee, one management representative, and a third member to be chosen by the first two—suggests that the parties to the agreement contemplated that the three-person board would be required to resolve only uncomplicated issues concerning merely the application of the plan. By contrast, the dispute in this case centered on interpretation of basic provisions of the plan, required sophisticated actuarial computations, and concerned all of the covered employees."

The court of appeals failed to address a number of defenses against summary judgment raised by petitioners including:

1. That petitioners' claim of being denied pensions on reaching age 55, at the least, entitled them to an accounting and a judicial determination of their specific pension entitlements from First Trust, the trustee of their pension fund.

2. That the agreement was void as to petitioners because the union breached its duty of fair representation in entering into an agreement without their concurrence that divested them of vested pension rights.

3. That the agreement was void as to petitioners because there was no consideration to them under the agreement, which provided them no benefit.

4. That petitioners claim that they had been fraudulently induced to remain as Gould employees at lower

compensation by its falsely manifesting that they would receive pension benefits could not have been barred by the arbitration and agreement.

In reaching its conclusion that the Union and Gould merely implemented the arbitrator's award in their subsequent agreement, the court of appeals misapprehended the cardinal fact that the $570,600, by which Gould admitted underfunding petitioners' pension fund, was not placed in the fund under the agreement. That, in fact, the agreement entirely divested petitioners of their rights to participate in this money. The court's decision erroneously said (A5 and A6):

> "Appellees, active employees whose pension benefits had vested, *contended that although some additional money was placed in the trust fund,* the dispute was resolved so as to give them no benefits while giving retired employees full benefits (emphasis added)."

Petitioners repeatedly pointed out in their opposing memorandum in the district court and their appellate brief that the agreement did not place any money in the common pension fund or in any other fund. Instead, it provided only for supplemental pension payments to those persons named on schedule A to the agreement that were retired and drawing pensions at the time the Wilkening plant was closed. The agreement entirely deprived petitioners and the other active employees of their vested rights to participate in the amount by which their fund was admittedly underfunded. Petitioners even requested that the court of appeals direct the entry of partial summary judgment against Gould on its admission that the $570,600 was not placed in their common pension fund.

REASONS FOR GRANTING THE WRIT

I. The decision below is at variance with the decisions of this court.

The court below erred in holding that the arbitration and agreement barred petitioners' action. The arbitrator's decision standing alone was no problem. He decided that Gould had underfunded the pension plan in violation of the pension agreement and that the company should add the amount of the underfunding to the pension fund. He did not decide the amount of the underfunding. He left this to subsequent negotiations between the company and the union with the directive that they return to him for ultimate resolution if they could not reach an agreement. Gould and the union never returned to the arbitrator. Their 1977 agreement, reached a year and a half after the arbitrator's decision, was entirely a private matter. It was reached without providing notice to the petitioners or the other terminated workers at Gould's Wilkening facility, without convening any union membership meeting, and without taking any vote on the subject. There was no evidence showing that the union had authority to act on behalf of its former members three years after the termination of their employment and a year and one-half after the arbitrator's decision.

The agreement did not conform to the arbitrator's award. Instead of placing the $570,600 admitted underfunding into the pension fund, it purported to settle the arbitration grievance by establishing supplemental pension payments only for certain named retirees. Even if all these retirees died, petitioners would still not benefit from the agreement. The divestiture brought about by the agreement significantly abridged petitioners' pension rights. Those petitioners who have reached retirement

age of 55 are being denied pensions on the basis that the pension fund is inadequate.

The court of appeals' decision holding that petitioners' action could not continue is at variance with decisions of this court:

1. The court of appeals held that arbitration could be finally determined by a private agreement, stripping pension beneficiaries of vested property rights without their consent and without providing them notice or opportunity to be heard and object. This is contrary to *Mullane, Special Guardian v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and other decisions of this court interpreting the procedural safeguards required by due process and fundamental fairness in any final adjudication of property rights.

2. The court of appeals upheld the union/company agreement that stripped petitioners of vested pension rights without their consent. This is contrary to *Allied Chemical & Alkali Workers, Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). *Allied* says at footnote 20 that vested pension rights may not be affected by agreement of the company and the union without the concurrence of the beneficiaries. Further, the pension plan agreement said:

> "ARTICLE VI
>
> "Amendment of the Plan
>
> "SECTION 6.1 Power to Amend . . . No amendment may be made, however, which would reduce the interest in the plan vested in any participant at the time of the amendment or which would cause any part of the assets contributed to the plan to be diverted to any use or purpose other than for the exclusive benefit of the participants and their beneficiaries . . ."

3. The court of appeals enforced the union/company agreement against petitioners although consideration to petitioners was lacking. This is contrary to *Maynard v. Durham and Southern Railway Company*, 365 U.S. 160 (1961). This case involves the effect of a purported release on rights arising under the Labor Management Relations Act. It is well established that federal law governs all questions relating to the validity of, and defenses to, purported releases of federal statutory causes of actions. *Locafrance U.S. Corporation v. Intermodal Systems Leasing, Inc.*, 558 F.2d 1113, 1115 (2nd Cir. 1977). Under federal law, a release without consideration is void. *Maynard v. Durham and Southern Railway Company, supra. Maynard* said (365 U.S. at 163):

> "A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right."

The purported release signed by the union is void as against petitioners. The only benefit provided under the release was to the persons specifically named on Schedule A attached to the release, who were former employees already retired and drawing pensions at the time of the plant's shut-down. Petitioners received no consideration under the agreement and suffered the detriment of being divested of rights to participate in money due their pension fund.

4. The court of appeals deviated from guidelines governing summary judgment established in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962); and, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). This court has consistently held that summary judgment should not be granted if the party opposing the motion could establish

any set of facts that would entitle it to relief. Further, that the function of the court considering a summary judgment motion is not to usurp the jury's function by weighing competing evidence, but rather to establish whether issues of fact remain to be tried. The court below deviated from these precepts in a number of respects:

a. Petitioners claimed that the union breached its duty of fair representation in entering an agreement that provided them no benefit and divested them of their vested right to participate in money due their pension fund. This court held that, where the union breaches its duty of fair representation, the employee is not precluded by the union's action. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Petitioners raising the issue created, at the least, a triable issue of fact that precluded summary judgment. The issue should not have been ignored by the court below.

b. The court below granted summary judgment for First Trust, the trustee of the pension plan, without basis. First Trust was not a party to the arbitration or the union/company agreement. The issue submitted to arbitration had nothing to do with the specific pension entitlement of any person but only dealt with whether Gould had properly funded the pension plan. Petitioners who have reached age 55 are being denied pensions by First Trust, not on the basis of judicial determination, but by fiat. Petitioners were, at the least, entitled to an accounting and a determination of their pension entitlements against First Trust.

c. Petitioners' amended complaint stated a fraud claim against Gould. It alleged that Gould willfully made misstatements of material fact to induce petitioners to

remain in its employ at a lower rate of compensation than they would customarily demand, including manifesting that they would get pensions, when it had already formulated the intent not to pay them pensions by closing down the Wilkening plant at a time when the pension fund would be inadequate to pay them pensions; and, that petitioners, on the basis of these fraudulent misrepresentations, not only worked for lower wages, but also remained in the employ of Gould, forebearing from seeking alternate employment which would have provided valid pension benefits.

This fraud claim was not within the scope of submission to the arbitrator and there is no showing that it was in the contemplation of the union or the company at the time they entered into their agreement. It is the general rule of law that, regardless of the language of a release, it does not extend to injuries not within the contemplation of the parties when settlement was agreed upon. 76 C.J.S., Release §51 *et seq.* The court below ignored this fraud claim, which also precluded summary judgment.

d. The court of appeals, in directing summary judgment, ruled on ambiguous grievance procedures in the collective bargaining agreement. It chose Article XVII, providing for final and binding arbitration, rather than Article XII, providing for resolution of pension disputes by a three-member board without any finality provision. Petitioners requested a jury trial. Resolution of ambiguities in a contract which hinges on the intent of the parties is for the jury. *Fitzsimmons v. Jersey State Bank*, 528 F.2d 692 (7th Cir. 1976).

e. The court below incorrectly found that the union/company agreement merely implemented the arbitrator's award without competent evidence. This finding was refuted by the language of the agreement, which showed on its face that it failed to place any money in the common pension fund in violation of the arbitrator's direction. The arbitrator's decision did not set forth a formula to mechanically calculate the amount of the underfunding. The year and one-half that elapsed between the arbitrator's decision and the agreement was inconsistent with any theory of mechanical implementation. There was no competent evidence showing how the union and the company reached this agreement. No affidavit was submitted from actuaries or other persons who were actually involved in reaching the agreement. Respondents sole evidence on the subject was an affidavit by Gould's director of labor relations. This gentleman, at his deposition, admitted that he was not involved in the negotiations that led to the agreement and did not carry out any role in entering into the agreement. Petitioners pointed out in their appellate brief that there was no evidence how the terms of the agreement were established that met the requirements of Rule 56(a), F.R. Civ. P., requiring that summary judgment evidence be admissible evidence based on personal knowledge. The court below ignored petitioners' objections and chose to make determinations on nonexistent or incompetent evidence.

II. The court below has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

The 62 petitioners spent their entire working lives under the belief they would achieve pensions. The decision below excludes them from any judicial review of their pension denial. As discussed, the decision below involved a substantial departure from due process and fundamental fairness in final adjudication of property rights and from standards governing summary judgment procedures. The court upheld a private agreement stripping petitioners of vested property rights in their pension fund, which was reached without authorization, notice, or opportunity to be heard. The court ignored a number of issues raised by petitioners in their appellate brief that precluded summary judgment. The court also made findings on the basis of nonexistent or incompetent evidence and usurped the jury's function in making a determination of ambiguous provisions in the collective bargaining contract. The decision also misapprehended the cardinal fact that the union/company agreement did not carry out the arbitrator's directions to place the $570,600 admitted underfunding into the common pension fund or, indeed, into any fund.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1118

ADAMS, ROBERT J., BUCKLEY, MERREDNA T., CALLOWAY, WILLIAM J., CONNELL, JAMES JOSEPH, COSELLA, ANTHONY MICHAEL, COOK, JOHN R., CROWLEY, ANNE, ON BEHALF OF THE ESTATE OF WILLIAM J. CROWLEY, DECEASED, CULLEN, KATHRYN M., DiCARLO, ANGELINA A., DELGRAMMASTRO, ROCCO, DIEHL, KATHLEEN, AS EXECUTRIX OF THE ESTATE OF JOHN M. DILLENSCHNEIDER, DECEASED, DOMAROTSKY, WANDA A., DREGAR, FRANK A., EBY, ROBERT J., FAY, AMANDA, FLINN, MARTHA, FLOOD, THOMAS E., FRAZIER, CORNELIUS, JR., GERACE, MARY, GUOKAS, ROSE T., HABINA, MARY F., HICKMAN, JAMES, JONES, ROBERT H., KELLY, PEARL, KLEIN, JOSEPH J., LINDER, ELIZABETH D., MARUCCI, AUGUSTINE, McGOWAN, JAMES, McNALLY, ELIZABETH A., MORRIS, JOHN, MUMBOWER, JOHN, MYERS, ANNA M., MYERS, AGNES M., NEFF, JOHN A., PAPALA, GRACE MARY, PETRICCIONE, ANNA, PHILLIPS, RICHARD M., RALLS, RUSSELL, RAYSICK, FLORENCE, RONAU, DANIEL J., RUSSELL, BERNARD C., RUSSELL, JOHN V., RUSSELL, MARGARET, SANTOLERI, ANTHONY, STANOWITCH, WALTER J., STEIN, MADELINE T., STEINMETZ, JOHN F., STILLWELL, BEATRICE L., SMITH, MARIE, SWALLOW, NANCY, WATTS, WILLIAM J., WEISS, ANTOINETTE W., WILLIAMS, CLIFFORD W., WILLIAMS, ROBERT, UMSTETTER, FRANK,

VENTI, MARIE, WOLLNER, JAMES C., BARLOW, BRIDGET

v.

GOULD, INC. and FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA, Individually and as Trustee of the GOULD INC. PENSION TRUST FOR HOURLY EMPLOYEES and PENSION BENEFIT GUARANTY CORPORATION

Gould, Inc., and First Trust Company of St. Paul, Minnesota

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-2365)

Argued August 4, 1982

Before: ALDISERT and WEIS, *Circuit Judges*, and RE, Chief Judge.*

(Filed September 2, 1982)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The sole question presented for resolution in this interlocutory appeal certified under 28 U.S.C. §1292(b) is whether certain individual employees, plaintiffs below, are bound by the results of an arbitration between their employer and their union and thereby barred from bringing their complaint in federal court. The district court determined they were not and denied defendants' motion for summary judgment. Defendants obtained the district court's certification of the question, however, and we allowed the appeal. We reverse.

I.

In 1962, appellant Gould, Inc. purchased the Wilkening Manufacturing Co. piston ring manufacturing plant, whose employees were represented by Local

416 of the United Auto Workers. The union and Gould entered into successive collective bargaining agreements as well as a pension agreement whose trust assets are administered by appellant First Trust Co. In 1973, because of its "antiquated plant, . . . failing product line, intense competition, and a declining market share," Gould announced its intention to terminate operations at the plant and to release all of the employees. Gould and UAW representatives met to discuss the phase-out of operations, including the ramifications for the pension plan. Determining that the plan's assets were actuarially insufficient to provide full benefit payments to all claimants and retirees, the union demanded that Gould fully fund the plan. When Gould refused, the union filed a grievance under Article XVII ("Grievance Procedure") of the collective bargaining agreement, even though Article XII ("Pension Plan") of the same agreement established procedures for the resolution of pension disputes.

Unable to resolve the dispute, Gould and the union submitted it to a single arbitrator pursuant to the final step of Article XVII. The union again demanded that Gould fully fund the plan or, alternatively, fund it on a sound actuarial basis. Gould argued that it had met its contractual obligations. Professor John Perry Horlacher, Chairman of the University of Pennsylvania Department of Political Science and former Vice President of the National Academy of (Labor) Arbitrators, served as arbitrator and found that Gould had not properly funded the plan. On November 24, 1975, he issued an award which in part ordered the following:

> 5. The Company is directed to make further contributions to the fund, using to calculate them the assumptions that were in effect at the end of 1968. These shall be in addition to the contributions already made.
>
> 6. These additional contributions shall be for the period when the changed assumptions were made effective after 1968 until the Plan terminated.

7. In the event of disagreement concerning the amount of these additional contributions, the Company's and the Union's actuaries shall negotiate the sums. If they cannot agree, their contentions in writing shall be forwarded to me and I will make the determination.

8. The money put into the Plan's fund by direction of this award shall be distributed to the eligible employees in accordance with Section 7.2 of the Plan contract as modified by any side agreement in effect at the time of the Plan's termination.

Although the arbitrator rejected the union's demand for full funding, he required Gould to recalculate its contributions so that the benefits could be increased in line with the pension agreement's asset allocation provisions. The union, by its counsel and actuary, reviewed the new computations and agreed that they complied with the arbitrator's award. The record does not indicate that this post-arbitration activity was anything more than what a Gould official characterized as "a question of implementing the award and . . . working out numbers."[1] The union also released any employee claims against Gould arising from the arbitration.

Appellees, active employees whose pension benefits had vested,[2] contended that although some additional

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1. Appellees contend there were no facts in the record supporting appellants' statement that the process of reaching the final amount of $570,000 was "simply a mechanical implementation of the award." The testimony quoted in the text supports appellants' position, however, and appellees introduced no evidence to rebut it.

2. Under section 4.4 of the pension agreement, "vested benefits" were described as follows:

> A participant whose employment is terminated for a reason other than his retirement or his death, who has a minimum of ten years of credited service shall be entitled to the vested benefit consisting of a pension, the monthly amount of which shall equal the normal retirement benefit. The vested benefit shall be payable on the first day of each month beginning with the participant's normal retirement date and ending upon the first day of the month in which his death occurs.

money was placed in the trust fund, the dispute was resolved so as to give them no benefits while giving retired employees full benefits. They brought an action in the district court claiming that Gould had breached its contractual obligation under the pension plan and had fraudulently induced the plaintiffs to continue their employment, and that First Trust had breached its fiduciary duty in refusing to pay pension benefits when due. Defendants, citing the finality provision of the Article XVII grievance procedure, moved for summary judgment on the ground that the plaintiffs were bound by the arbitrator's award. Basing its decision on *Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F.Supp. 387 (D.Minn. 1969), the district court denied the motion. The court was of the view that in submitting the dispute to arbitration, Gould and the union had attempted to "bargain away" rights that were vested under the plan:

> Accordingly, the court finds that the union and Gould impermissibly engaged in a negotiation endeavor which resulted in the divestiture of the plaintiff's pension rights. As a consequence, because the plaintiffs did not consent, the settlement and release are inapplicable as a bar to the present action.

Adams v. Gould, Inc., No. 78-2365, mem. op. at 11-12 (E.D. Pa. May 12, 1981). In response to defendants' subsequent motion, however, the district court certified for appeal the question now before this court: "Whether Plaintiffs are bound by the results of the arbitration between Gould and their collective bargaining representative and thereby barred from this suit."

II.

Because the district court relied on *Hauser v. Farwell, Ozmun, Kirk & Co.*, we begin our discussion

with that case. We are persuaded that its holding and reasoning are irrelevant to the case before us. The union and the company in *Hauser* entered into *negotiations* that detracted from vested rights of certain employees; under those circumstances the court stated that it was bound by *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), *aff'd*, 327 U.S. 661 (1946), and held that although a union may bargain as to prospective matters, it cannot bargain away accrued or vested rights of its members. *Hauser* involved no arbitration proceeding; indeed, the court noted that the "collective bargaining contract containing grievance procedures had become defunct." 299 F.Supp. at 392.

In the case at bar, however, Gould and the union did not bargain or negotiate; rather, they referred the matter to arbitration pursuant to a viable collective bargaining agreement. Apparently the district court mistakenly equated arbitration — a method of adjudication — with negotiation and bargaining. Appellees contend that the final agreement was a product of negotiation independent of the arbitration. Although the union and Gould held further discussions following the arbitration, as their written agreement demonstrates, they merely implemented the arbitrator's award in all its sophisticated ramifications, performing the calculations he had ordered. Paragraph 7 of the award shows that the arbitrator clearly contemplated that, because of the nature of actuarial assumptions, the parties would be likely to differ about the details of the funding, and therefore he directed them to resolve those differences between themselves, if possible.

Moreover, we believe that in its application of *Hauser*, the district court embraced the fallacy of *petitio principii* by assuming the conclusion that *sum certain* financial rights under the pension plan already had vested in the plaintiffs. The clear words of the pension plan

militate against this assumption,[3] for its schedule of priorities for distribution upon plan termination provides that "to the extent that such assets are sufficient," they are to be distributed first to retirees, then to participants with vested interests "in full if the remaining assets be sufficient, otherwise on a proportional basis." Thus, the agreement was drafted in contemplation of a circumstance where there might not be enough money to go around, and the employees' "vested" right was only a right to participate in whatever distribution there might be. *See United Steelworkers v. Crane Co.*, 605 F.2d 714 (3d Cir. 1979).

In sum, neither the arbitration nor the post-award agreement can be said to represent independent negotiation to disturb rights that were already vested;[4] accord-

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3. Section 7.2 of the pension agreement establishes the following schedule of priorities:

> Upon the termination of the plan with respect to any group of employees, that part of the assets available under the method of funding in effect upon the date of termination which is allocable to the terminated group shall be applied, to the extent that such assets are sufficient, so as to provide retirement benefits (based upon service credited to the date of termination) for participants in the following order of precedence:
>
> (a) to continue the payment of retirement benefits to retired participants, in full if the available assets be sufficient, otherwise on a proportional basis;
>
> (b) to provide for the deferred payment of retirement benefits, beginning on their respective normal retirement dates, to inactive participants and active participants having vested interests in the plan, in full if the remaining assets be sufficient, otherwise on a proportional basis; and
>
> (c) to provide for the deferred payment of retirement benefits, beginning on their respective normal retirement dates, to active participants not having vested interests in the plan, in full if the remaining assets be sufficient, otherwise on a proportional basis.

4. We note that in the agreement the parties stated:

> Notwithstanding the foregoing, the UAW, if Gould should breach this Agreement, may elect to enforce the terms of this

ingly, we conclude that the district court's reliance on *Hauser* was error. We now turn to the intertwined questions of whether the issue was appropriate for arbitration under the collective bargaining agreement and, if so, whether the parties used the proper arbitration provision.

III.

If there is any expression of public policy pertaining to labor-management relations that has emerged loud and clear in today's jurisprudence it is the national policy favoring arbitration of labor disputes. The governing principles are familiar. Federal labor law imposes on the parties to a collective bargaining agreement no inherent duty to arbitrate; instead, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The arbitrability of a given dispute is to be determined by the court on the basis of its interpretation of the agreement. In this, the court must be mindful of the federal labor policy encouraging arbitration of labor disputes. The Supreme Court has established a strong presumption favoring arbitrability:

> [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, ... [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that

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Agreement or to enforce the opinion of Arbitrator Horlacher. If the UAW elects to enforce said Arbitrator's opinion, then Gould shall be given full credit for any and all payments made pursuant to this Agreement.

We construe this to mean that the parties had reached an agreement as contemplated in paragraph 7 of the arbitrator's award. In the event that Gould breached the agreement, then, consonant with paragraph 7, the union had the right to apply to the arbitrator "to make the determination" of the additional contributions.

> the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). *See* cases collected in *Eberle Tanning Co. v. Section 63L*, ____ F.2d ____, No. 81-2899 (3d Cir. June 28, 1982). Consistent with this policy, the Supreme Court has held that arbitration awards bind not only the union, but also all employees represented by the union. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 n.4 (1981) ("an arbitration award stands between the employee and any relief which may be awarded against the company"). *See also Panza v. Armco Steel Corp.*, 316 F.2d 69 (3d Cir.)(per curiam), *cert. denied*, 375 U.S. 897 (1963).

A.

We have no difficulty applying these precepts to the collective bargaining agreement before us. Although, as appellees stress, Article XVII appears to focus on shop-related disputes, it is not limited to those issues.[5]

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5. Article XVII details a six-step grievance procedure. Submission of a dispute to an arbitrator is controlled by step (1) of section 1, and by section 2.

> SECTION 1. It is understood that any questions that may arise in the minds of employees are to be presented to their Foreman in the regular course of work. It is further understood that the Union shall have the right to submit the question of a discharge to the Grievance Procedure. Information concerning work, working conditions and Company rules and regulations will be supplied by the employees' Foreman. Instructions shall be given by the Foreman of a department, or designated employees of the department, or the Training Department, with the knowledge and sanction of the Foreman. If in the course of work any misunderstanding occurs which the Foreman cannot settle, thereby leading to a grievance, the following procedure shall be followed:
>
> • • •
>
> Step (6). If the grievance cannot be settled promptly and amicably between the parties hereto as outlined above,

Indeed, the opening sentence of Article XVII demonstrates the parties' understanding that the grievance procedure would be used to resolve "any questions that may arise in the minds of employees." Pension matters properly could be included among these questions, as the pension agreement is, by incorporation in Article XII, made part of the collective bargaining agreement. We are persuaded that the differing views in funding the plan were serious and resulted from varying but reasonable interpretations of Gould's contractual duties under the pension plan. The union argued that the pension agreement required either full funding or funding on a sound actuarial basis; Gould's response was based on section 5.3 of that same agreement:

> Gould's board of directors shall determine the method by which the plan shall be funded and may

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such matter shall be jointly referred within a period of thirty (30) days following the Company answer in Step 5, to the Federal Mediation and Conciliation Service, who shall be requested to submit a list of five arbitrators' names, from which list the Company and the Union shall each strike out not more than two such names. The Service shall then appoint an arbitrator from the list whose name has not been stricken as aforesaid. The arbitrator shall render his decision within thirty (30) days after presentation of the case. The party losing the case shall pay the cost for the services of the arbitrator. The arbitrator shall have the authority to assess one or the other of the parties the entire cost or divide it in any proportion between them when the decision is such that the losing party cannot be readily identified. Each party shall bear the expense of preparing and presenting its own case and the cost of their own representatives.

SECTION 2. The arbitrator may consider and decide only the particular grievance presented to him by the Company and the Union, and his decision shall be based solely upon his interpretation of the provisions of this Agreement. The arbitrator shall not have the right to amend, take away, modify, add to, or change any of the provisions of this Agreement. The decision of the arbitrator shall be final and binding on the Company, Union and employees and shall be carried out by them without strike, slow-down, or lockout.

> change the method of funding from time to time. . . . [I]f each participating employer makes the contributions required by the computation of the actuary . . . the participating employer shall have no further responsibility for the payment of benefits provided by the plan . . . .

In our view the dispute between the UAW and Gould over this pension plan was a classic case for arbitration.

B.

Nor can we agree with appellees that Gould and the union employed an inappropriate procedure. Appellees argue that the arbitration parties erred in using the agreement's general grievance procedure, that they should have presented the dispute to a three-person board for resolution under Article XII.[6] The crucial difference between the two procedures is that unlike Article XVII, Article XII has no provision that the board's determination will be final and binding.

We conclude that the union and Gould properly chose arbitration under Article XVII. The informal procedure outlined in Article XII deals with relatively simple issues, such as dates of individual service or matters relating to dates of individual retirement. The very structure of the Article XII board — one employee, one management representative, and a third member to be chosen by the first two — suggests that the parties to the

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6. Article XII in part directs that

> A board composed of 1 employee and 1 management member shall be established at the Union group location to settle any differences or disputes regarding the application of provisions of the plan to employees including differences or disputes concerning any extension of retirement date. The board shall also include an impartial chairman chosen by its members.

agreement contemplated that the three-person board would be required to resolve only uncomplicated issues concerning merely the *application* of the plan. By contrast, the dispute in this case centered on *interpretation* of basic provisions of the plan, required sophisticated actuarial computations, and concerned all of the covered employees. The particular credentials of the arbitrator chosen here — a nationally known specialist who had to grapple with esoteric problems of pension plan funding — is in itself a strong indication that the parties intended that the more formal arbitration provisions of Article XVII were to be employed in the interpretation of the actuarial provisions of the collective bargaining agreement and the pension plan it incorporated.[7]

IV.

Accordingly, we answer the certified question in the affirmative: the plaintiffs in the district court were bound by the results of the arbitration between Gould and their collective bargaining representatives and therefore barred from bringing the action in district court.[8]

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7. As further indication of the dispute's complexity, in the proceedings before the arbitrator the UAW was represented by a member of the Philadelphia bar experienced in labor litigation, by a UAW assistant general counsel, by a UAW actuary, by the president of Local 416, and by other members of the local. Such an array does not indicate that the matter was one for informal resolution under Article XII.

8. We need not and do not reach appellants' contention that the district court action was barred by the applicable statute of limitations.

The order of the district court will be reversed and the proceedings remanded with a direction to enter summary judgment in favor of the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

CIVIL ACTION
NO. 78-2365

ROBERT J. ADAMS, *et al.*,

v.

GOULD, INC., FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA, Individually and as Trustee of the Gould, Inc. Pension Trust For Hourly Employees and Pension Benefit Guaranty Corporation.

FILED MAY 14 1981

MEMORANDUM AND ORDER

HANNUM, *J.* MAY 12th, 1981

The plaintiff's Amended Complaint alleged breach of contract, fraud and breach of fiduciary duty attributable to various of the defendants. The allegations emmanate from an arguably impermissible denial of accrued or vested pension rights which were owed the plaintiffs' pursuant to a pension plan contained in a collective bargaining agreement. The plaintiffs were all hourly-wage employees at the defendant Gould, Inc.'s [hereinafter "Gould"] Wilkening Plant which ceased production in July of 1974.[1] *See* Amended Complaint, Docket Entry No.

[1] There exist considerable differences of opinion with respect to when production at the Wilkening Plant ceased and, correspondingly, when the employees were terminated. The plaintiffs in their Amended Complaint suggest July, 1974 as the date of the cessation of production

(Footnote continued on following page)

24, ¶11. The defendant First Trust Company of St. Paul, Minnesota [hereinafter "First Trust"] was the designated trustee of the pension fund. The defendant Pension Benefit Guaranty Corporation [hereinafter "PBGC"] is, of course, a public entity created by statute and, for purposes of this case, the alleged guarantor of Gould's pension plan. *See* 29 U.S.C. §1321 *et seq.* Jurisdiction is invoked under 29 U.S.C. §185, 29 U.S.C. §1132 and 28 U.S.C. §1332.

The essential facts pertinent to this case are as follows. In 1953, the plaintiffs' collective bargaining representative, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 416 [hereinafter "Union"] and the plaintiffs' prior employer, the Wilkening Manufacturing Company, agreed to a pension plan for the benefit of hourly-wage employees. Subsequently, in 1962, Gould purchased the Wilkening Manufacturing Company and assumed the latter's obligations created in a collective bargaining agreement, including the obligation to maintain a non-

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(Footnote continued from preceding page)

and the termination of employment although they subsequently proffered the date of June, 1974. *Compare* Amended Complaint, Docket Entry No. 24, ¶11 *with* Plaintiffs' Memorandum In Opposition To Defendants Gould, Inc.'s And First Trust Of St. Paul, Minnesota's Motion For Entry Of Summary Judgment, Docket Entry No. 55, p. 5. Gould and First Trust, however, contend that production ceased in February, 1974. *See* Motion Of Defendants Gould, Inc. And First Trust Company Of St. Paul, Minnesota For Entry Of Summary Judgment, Docket entry No. 46, p. 4. No date pertaining to the employment termination is provided. These dates bear considerable importance when determining the liability of PBGC and when discussing its Motion To Dismiss. *See* note 8 and accompanying text *supra.*

contributory pension fund consistent with the terms of the existing pension plan. These obligations were additionally ratified, effective on June 5, 1972, when a new collective bargaining agreement was approved. *See* Motion Of Defendants' Gould, Inc. And First Trust Company Of St. Paul, Minnesota For Entry Of Summary Judgment, Exhibit G. [hereinafter "Pension Plan"].

The present controversy arose when Gould ceased production in the Wilkening Plant and terminated the plaintiffs' employment. At this juncture, it was revealed that the pension plan would also be terminated with the result that many of the employees, including the plaintiffs, would not receive pension benefits. Before the cessation of production and the termination of the plaintiffs' employment, grievance procedures were implemented. The question whether Gould was violating the collective bargaining agreement by its failure to provide full benefits to employees possessing vested pension rights was eventually submitted to final and binding arbitration. The grievance was heard by a single arbitrator on January 10, 1975 and February 12, 1975 and an opinion was issued on November 24, 1975 requiring Gould to make further contributions to the pension fund to be calculated in accordance with a formula of actuarial assumptions. In the event the union and Gould could not reach an agreement on the amount of a specific award, the matter of calculation was to be re-submitted to the arbitrator. An agreement was reached on March 15, 1977, however, by which Gould would contribute $570,600.00 to the pension fund in exchange for a release of liability executed by the union.

The present action was instituted on July 13, 1978 because, regardless of the additional Gould contribution, the pension plan would not be fully funded. The pension plan specified a list of priority classes of employees and their settlement to available pension funds. The applicable list is as follows:

> SECTION 7.2 Distribution upon Termination. Upon the termination of the plan with respect to any group of employees, that part of the assets available under the method of funding in effect upon the date of termination which is allocable to the terminated group shall be applied, to the extent that such assets are sufficient, so as to provide retirement benefits (based upon service credited to the date of termination) for participants in the following order of precedence:
>
> (a) to continue the payment of retirement benefits to retired participants, in full if the available assets be sufficient, otherwise on a proportional basis:
>
> (b) to provide for the deferred payment of retirement benefits, beginning on their respective normal retirement dates, to inactive participants and active participants having vested interests In the plan, in full if the remaining assets be sufficient, otherwise on a proportional basis; and
>
> (c) to provide for the deferred payment of retirement benefits, beginning on their respective normal retirement dates, to active participants not having vested interests In the plan, in full if the remaining assets be sufficient, otherwise on a proportional basis.

> The payment of the retirement benefits provided by this section may be made either by means of monthly cash payments to the participants out of the trust fund or by means of the purchase and delivery to the participants of annuity contracts providing them respectively with monthly pension payments, as determined by the employer; provided, however, that if the amounts are too small, in the opinion of the employer, to make monthly payments practicable, payments may be quarterly, annually, or by means of single sums in cash.

See Pension Plan, Article VII, Section 7.2. The plaintiffs allegedly fall into class B and the fund was unfortunately insufficient to provide retirement benefits to them. *See* Plaintiffs' Memorandum In Opposition To Defendants Gould, Inc.'s And First Trust Company Of St. Paul, Minnesota's Motion For Entry Of Summary Judgment, Docket Entry No. 55, p. 6. The plaintiffs accordingly assert that the defendants are liable to the extent necessary to fully fund the pension plan, notwithstanding the settlement and release executed by the union.

Presently, before the Court for resolution are two (2) motions. Gould and First Trust jointly filed a Motion For Summary Judgment and PBGC filed a Motion To Dismiss. Numerous memoranda have been submitted by the parties and considered by the Court and oral argument has been heard.

Motion For Summary Judgment.

Essentially, Gould and First Trust contend that the plaintiffs lack recourse to this Court because the substance and merits of this matter were resolved during

final and binding arbitration. The applicable statute of limitations governing the time by which an appeal from an arbitrator's award must be effected has expired. Additionally, Gould and First Trust assert the doctrine of collateral estoppel and argue the effect of a settlement and release executed by the union. Conversely, the plaintiffs argue that the union exceeded its authority by submitting a pension grievance to final and binding arbitration because the collective bargaining agreement did not provide for such a procedure. As a consequence, the arbitrator's award is void and the plaintiffs are thereby relieved from both its direct and indirect effect. *Citing, e.g., Rothlein v. Armour & Company*, 391 F.2d 574 (3d Cir. 1968). In this regard, the plaintiffs also apparently assert that the union exceeded its authority in attempting to bind them in a matter concerning their vested pension rights and because the collective bargaining agreement expired before the arbitrator's opinion was rendered and the eventual settlement and release was consummated. Additionally, the plaintiffs contend that even if the arbitration procedure was valid, the opinion rendered was incomplete and thus not final and binding. *Citing Hamilton v. Hart*, 125 Pa. 142 (1889); *Hoit v. Berger-Crittenden*, 84 N.W. 48 (Minn. 1900). Finally, the plaintiffs argue that neither the doctrine of collateral estoppel nor the effect of the release precludes their present action. As respects the effect of the release, the plaintiffs contend, *inter alia*, that it is not supported by consideration, that it does not include the plaintiffs as a party and that the union's execution of it was a breach of the union's duty of fair representation and thus not binding.

After a careful review of the parties' contentions referenced above, the Court finds itself in a rather unique position of disposing of this motion based upon the determination afforded an issue only summarily and tangentially briefed. That issue focuses upon the allegedly vested nature of the plaintiffs' pension rights and the procedures available to a vested pensioner to seek redress when vested pension rights have been infringed. As will be more fully developed, the resolution of this issue will result in the denial of Gould's and First Trust's joint motion.

The plaintiffs have alleged facts in conjunction with and consistent with the following statement:

> At the time of *termination of their employment*, each plaintiff had attained in excess of *10 years of credited service* toward the pension plan and *had vested benefits under such plan* entitling each plaintiff to receive a full monthly pension under the terms of the plan upon reaching age 55.

See Plaintiffs' Memorandum In Opposition To Defendants Gould, Inc.'s And First Trust Company of St. Paul, Minnesota's Motion For Entry Of Summary Judgment, Docket Entry No. 55, p. 6. (Emphasis added). Pursuant to the terms of the pension plan, pension rights became vested upon the following occurrences:

> SECTION 4.4 *Vested Benefit. A participant whose employment is terminated for a reason other than his retirement or his death, who has a minimum of ten years credited service shall be entitled to the vested benefit consisting of a pension,* the monthly amount of which shall equal the normal retirement benefit. The vested benefit shall be payable

on the first day of each month beginning with the participant's normal retirement date and ending upon the first day of the month in which his death occurs.

See Pension Plan, Article IV, Section 4.4. There appears to be no dispute that these requirements for the achievement of vested pension rights have been satisfied by the plaintiffs. At the least, if there is a dispute, the plaintiffs have presented sufficient facts of record to withstand summary judgment favoring Gould and First Trust. *See generally Smith Kline Corp. v. Staats.* 483 F. Supp. 712, 719 (E.D.Pa. 1980); F. R. Civ. P. 56. "Vesting of pension rights occurs when all the eligibility requirements of a voluntary noncontributory pension plan have been met. . . ." *Turner v. Local Union No. 302, International Brotherhood of Teamsters, Chauffeurs, Warehouseman And Helpers of America,* 604 F.2d 1219, 1225 (9th Cir. 1979). Accordingly, the Court finds for the purpose of resolving the present motion that the plaintiffs possessed vested pension rights.

In the present case, the union, apparently without consultation, undertook the responsibility of bargaining for the plaintiffs and other members of the collective bargaining unit with respect to pensions and other matters. As a result, through arbitration and negotiation, a settlement was achieved which Gould and First Trust now assert as binding upon the plaintiffs for reasons that the union was authorized to bind the plaintiffs and this authorization was relied upon by Gould and First Trust and for reasons attributable to the doctrine of col-

lateral estoppel.[2] The attention in much of the numerous memoranda filed in this case was focused in these areas, particularly the effect of arbitration.[3]

Despite the union's assumption of bargaining authority, it is axiomatic that a union "cannot bargain away the accrued or vested rights of its members . . . [and] that employees [are] to be restored to their pension

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[2] Gould and First Trust advance the doctrine of collateral estoppel as a bar to the plaintiffs' present action, relying on the opinion rendered in Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 844 (3d Cir. 1974), which enunciated the following requirements:

a) The issue decided in the prior litigation must be identical with the issue presented in the action in question;

b) The prior litigation must have resulted in a final judgment on the merits; and

c) The party against whom the estoppel is asserted must have been a party, or in privity with a party, to the prior adjudication.

See also Blonder-Tongue v. University of Illinois Foundation, 402 U.S. 313 (1971). The Court deems the doctrine inapplicable. First, the issues determined at arbitration are not identical. The arbitrator did not properly consider whether the union and Gould could alter, modify, amend or destroy the plaintiffs' vested pension rights, an issue which the Court considers of paramount importance. Additionally and as respects the third requirement, the plaintiffs are not in privity with any party participating in the prior adjudication. *See* notes 4-7 and accompanying text *infra*.

[3] If the union had been endowed with the authority to bind the plaintiffs, the Court would have been inclined to approve the procedure utilized and the ultimate resolution of the motion advanced by Gould and First Trust. *See* Nolde Brothers, Inc. v. Local 358, Bakery & Confectionary Workers Union, AFL-CIO, 430 U.S. 243 (1977); General Drivers, Local 89 v. Riso & Co., 372 U.S. 517 (1963); Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1961); United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Bieski v. Eastern Automobile Forwarding Co., 396 F.2d 32 (3d Cir. 1968); PA. STAT. ANN. tit. 5, §161 *et seq.*

rights . . ." *Bianchin v. McGraw-Edison Co.*, 438 F. Supp. 585 (W.D.Pa. 1976), *citing Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945); *Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F. Supp. 387 (D.Minn. 1969). The Court in *Hauser*, particularly, considered the question "whether or not the matter of pension rights was one that the Company and Union together could affect and had the power to settle without direct individual employee participation and consent" and eventually concluded that "a Union may bargain as to prospective matters such as seniority rights, future conditions of employment, etc., [but] it cannot bargain away the accrued or vested rights of its members." *Hauser v. Farwell, Ozmun, Kirk & Co., supra* at 392-93 and 393. It was finally decided in *Hauser* that "without explicit authority or a power of attorney from the individual members, the Union . . . could not bargain away the vested rights of its membership, including plaintiffs' vested rights." *Hauser v. Farwell, Ozmun, Kirk & Co., supra* at 393.

The opinion provided in *Hauser* is extremely helpful to a resolution of these motions. The plaintiffs in the case *sub judice* were recipients of vested pension rights which had been previously bargained for and explicitly memorialized in the collective bargaining agreement.[4] In addition to Article IV, Section 4.2 previously set forth, the pension plan contained the following provision:

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[4] The Court recognizes the following language in International Ass'n of Machinists and Aerospace Workers, Lodge No. 1194 v. Garwood Industries, Inc., 368 F. Supp. 357, 362 (N.D. Ohio 1973) as equally applicable here:

> *The pension program here can, in no way, be considered a gift which can be eliminated unilaterally, but rather is a reflection of the union's willingness to reduce its demands in other economic areas.*

SECTION 6.1 Power to Amend. Gould now intends to continue the plan in its present form; nevertheless, Gould reserves to its board of directors the power to amend, alter, or wholly revise the plan, prospectively or retrospectively, at any time, and the interest of each participant in the plan is subject to the power so reserved. *No amendment may be made, however, which would reduce the interest in the plan vested in any participant at the time of the amendment or which would cause any part of the assets contributed to the plan to be diverted to any use or purpose other than for the exclusive benefit of the participants and their beneficiaries;* provided, however, that any amendment may be made which may be or become necessary in order:

a) that the plan will conform to the requirement of Section 401 (a), or of any similar successor provision, of the Internal Revenue Code; or

b) that all of the provisions of the plan will conform to all valid requirements of applicable federal and state laws.

SECTION 6.2 Method of Amendment. An amendment shall be stated in an instrument in writing signed in the name of Gould under its corporate seal by its president or vice president and attested by its secretary or assistant secretary.

SECTION 6.3 Notice of Amendment. Written notice of each amendment shall be given promptly to each other participating employer by Gould.

See Pension Plan, Article VI, Section 6.1. (Emphasis added). It is indeed unfortunate that the union and Gould bargained in apparent good faith to a resolution of the pension dispute but good intentions are not sufficient when the result would require the deprivation to the

plaintiffs of their vested pension rights.[5] As the court in *Hauser* noted:

> Unfortunately, as the court views it, *both were mistaken and proceeded, albeit in good faith, to do something over which they had no jurisdiction in effect, something which they had no power to do under the rationale of the decided cases without the individual consent of all plaintiffs. By so doing they converted a fund to a share of which plaintiffs were*

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[5] A question concerns the Court with respect to the plaintiffs' apparent idleness during the period in which the union and Gould first arbitrated and later negotiated the pension matters herein involved. In this regard, the following language is noted.

> [We] did not rule, and there is no basis for *assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property * * * allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights. No such ruling was necessary for their preservation and none was intended.*

Elgin, Joliet & Eastern Railway Co. v. Burley, 327 U.S. 661, 667-68 (1946). The Court does not find that the plaintiffs apparent idleness in any way disturbs their right to assert the present cause of action. It does not appear as though anyone

> *explained or attempted to explain to any of the employees the effect that this would have on any claims they might have and this court does not regard that these plaintiffs so conducted themselves as to fall within the ambit of the language quoted above from the second Elgin case. This was bound to be a disturbed time for plaintiffs as discharged employees with thoughts devoted to new employment, lack of future salary and a host of other immediate concerns. It is a fair inference that future pension rights were not foremost in the minds of plaintiffs.*

Hauser v. Farwell, Ozmun, Kirk & Co., *supra* at 394.

> *entitled. Innocent misapplication or deprivation of funds owned by others is in the law no less a conversion because such was done innocently or in ignorance.*

Hauser v. Farwell, Ozmun, Kirk & Co., supra at 395. Accordingly, the Court finds that the union and Gould impermissibly engaged in a negotiation endeavor which resulted in the divestiture of the plaintiffs' pension rights. As a consequence, because the plaintiffs did not consent, the settlement and release are inapplicable as a bar to the present action.[6] The plaintiffs' actions are properly before the Court. *See Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 179 (1971).[7]

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[6] The case of Dwyer v. Climatrol Industries, Inc., 544 F.2d 307 (7th Cir. 1976) involves a set of facts virtually identical to the present case but with one major difference. In *Climatrol*, the plaintiffs were not vested pensioners and, as a consequence, the court declined to rule in the plaintiffs' favor. The court did suggest the opposite conclusion if the facts had involved vested pensioners.

> *It seems to be conceded that a union has no authority on behalf of its membership to bargain away vested or accrued rights.*

Dwyer v. Climatrol Industries, Inc., *supra* at 310.

[7] The plaintiffs' common law actions were brought within the applicable statutes of limitation. *See* PA. CONS. STAT. ANN. tit. 42, §§5501 *et seq.* The plaintiffs' action brought pursuant to §301 of the Labor Management Relations Act is also properly postured. *See generally* Rothlein v. Armour & Company, 391 F.2d 574 (3d Cir. 1968).

Both the plaintiffs and Gould have filed motions to exclude portions of the record. Although the Court has not explicitly ruled on these motions, the Court's disposition is nontheless available in the context of this Memorandum. Accordingly, the motions are deemed resolved.

Motion To Dismiss.

PBGC has filed a Motion To Dismiss, asserting the ground that the plaintiffs have failed to state a claim upon which relief may be granted in contravention of F. R. Civ. P. 12(b)(6). Essentially, PBGC relies upon 29 U.S.C. §1381(b)(3) and 29 U.S.C. §1332(a) which jointly provide for the satisfaction of two (2) requirements before it may be declared liable for the payment of benefits. These requirements are summarized as follows:

> (1) The pension plan must be a covered plan; that is, a pension plan terminated after June 30, 1974; and
>
> (2) The pension plan must have been terminated.

In this regard, PBGC asserts that under the facts of the present case both requirements cannot possibly be satisfied and thus that the relief requested cannot be afforded. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For the reasons that follow, the Court will adopt PBGC's reasoning and position and grant its motion.

The plaintiffs aver only the following with respect to the alleged liability of PBGC:

> 4. Pension Benefit Guaranty Corporation ("PBGC") is a corporate body established within the United States Department of Labor, with its principal offices in Washington, D.C. It has the purpose, among other things, of guaranteeing payment of pension benefits to employees under employer pension plans. The powers, purposes, and duties of PBGC are fully detailed at 29 U.S.C.A. §1302 *et seq.*
>
> . . .
>
> 14. PBGC is a guarantor of plaintiffs' pension entitlement under their pension plan.

At argument and in post-argument memoranda, the plaintiffs contend that this mere description of the purpose of PBGC and the additional conclusory allegation portray circumstances potentially substantiating the plaintiffs' claim. The only interpretation of the plaintiffs' position that can be gleaned from all of the pleadings is that the pension plan herein concerned was part of a Gould, company-wide plan which was in existence after June 30, 1974 and which is thus "covered" within the meaning of the statute but that the plan was somehow "partially terminated" with respect to them, which would thus satisfy the second statutory requirement. *See* Docket Entry No. 75. The plaintiffs' position is patently inconsistent.

A close scrutinization of the plaintiffs' position reveals that they wish to assume two (2) different and inconsistent identities for the sole purpose of satisfying the statutory requirements necessarily preceding a declaration of PBGC liability. The plaintiffs contend that the Wilkening Plant pension plan was a component of the Gould, company-wide pension plan to satisfy the "covered" requirement contained in 29 U.S.C. §1381(b)(3) but, in their next breath, assert that their particular pension plan was terminated in order to satisfy that requirement which is contained in 29 U.S.C. §1332(a). The following excerpt from a February 4, 1980 letter to the Court from the plaintiffs' counsel, Richard A. Ash, Esquire, evidences this point:

> It is *plaintiffs' position in these papers, supported by admissible evidence, that the pension plan was a company-wide hourly employees pension plan, of which the Philadelphia workers were only one group,*

> *and that this plan was only partially terminated in 1974.* (See plaintiffs' Counterstatement of the Facts in their motion opposing summary judgment, pages 4-8).

See Docket Entry No. 75. The difficulty with which the plaintiffs are confronted by asserting that their plan was a component of the Gould "company-wide hourly employees pension plan" is that the Gould pension plan has never been terminated. *See* Second Supplemental Memorandum Of Defendant Pension Benefit Guaranty Corporation In Support Of Its Motion To Dismiss The Complaint, Docket Entry No. 59, p. 3. Accordingly, the requirement contained in 29 U.S.C. §1331(a) has not been satisfied and PBGC thus cannot be held liable for the payments of benefits.

In order to avoid possible confusion in the future, the Court will note that had the plaintiffs chosen to maintain and vigorously assert the position that the Wilkening Plan pension plan was a plan independent of the Gould, company-wide plan, the requirement contained in 29 U.S.C. §1381 would have been left unsatisfied. The plaintiffs cited the date of June, 1974 as the time when the Wilkening Plant ceased production and the plaintiffs' employment was terminated. *See* Plaintiffs' Memorandum In Opposition To The Defendant Gould, Inc.'s And First Trust Company Of St. Paul, Minnesota's Motion For Entry Of Summary Judgment, Docket Entry No. 55, p. 5. Gould has declared that the Wilkening "Pension Plan was discontinued in accordance with its terms on or before June 1, 1974." *See* Motion Of defendant Gould, Inc. And First Trust Company Of St. Paul, Minnesota For Entry Of Summary Judgment, Docket Entry No. 46,

¶13, p. 4. More convincingly, the parties primarily responsible for and familiar with the termination dates of the Wilkening Plant, its employees and the pension plan agreed that "the Wilkening Plant of Gould was closed in early 1974 and the pension plan . . . was terminated at that time." *See* Motion Of defendants Gould, Inc. And First Trust Company Of St. Paul, Minnesota For Entry Of Summary Judgment, Docket Entry No. 46, Exhibit F, p. 1.[8] Notably, all of the dates proffered precede the date of June 30, 1974, the date defining "covered" within the purview of 29 U.S.C. §1381(b)(3) and 1321(b). This aspect of the two (2) requirements would thus not be satisfied and dismissal would be warranted.

The Court has resolved both Gould's and First Trust's Motion For Summary Judgment and PBGC's Motion To Dismiss. The effect of these rulings is to provide the plaintiffs with recourse against Gould for payment of the allegedly owed pension benefits. The liability of PBGC cannot be established under the facts existent in this case and, as a consequence, PBGC will not be put to the unnecessary and unwarranted expense of defending this action.

An appropriate Order will be entered.

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[8] *See* note 1 *supra*.

Order of the District Court Denying Summary Judgment

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

CIVIL ACTION
NO. 78-2365

ROBERT J. ADAMS, *et al.*,

v.

GOULD, INC., FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA, Individually and as Trustee of the Gould, Inc. Pension Trust For Hourly Employees and Pension Benefit Guaranty Corporation.

ORDER

AND NOW, on this 12th day of May, 1981, it is ORDERED that Gould, Inc.'s and First Trust Company Of St. Paul, Minnesota's Motion For Summary Judgment is DENIED.

It is FURTHER ORDERED that Pension Benefit Guaranty Corporation's Motion To Dismiss is GRANTED.

It is FURTHER ORDERED that Plaintiffs' Motion To Strike And Exclude Portions Of Defendants' Statement Of Evidentiary Facts And Exhibits Filed In Support Of Motion For Summary Judgment and Defendants' Motion To Strike And Exclude Portions Of Plaintiffs' Statement Of Evidentiary Facts And Exhibits Filed In Support Of Their Memorandum In Opposition To Motion For Summary Judgment are RESOLVED in accordance with the foregoing Memorandum.

ENTERED: 5/15/81
CLERK OF COURT

(ILLEGIBLE B. HANNUM)
J.

Judgment of the Court of Appeals Directing Entry of Summary Judgment

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1118

ADAMS, ROBERT J., BUCKLEY, MERREDNA T., CALLOWAY, WILLIAM J., CONNELL, JAMES JOSEPH, COSELLA, ANTHONY MICHAEL, COOK, JOHN R., CROWLEY, ANNE, ON BEHALF OF THE ESTATE OF WILLIAM J. CROWLEY, DECEASED, CULLEN, KATHRYN M., DICARLO, ANGELINA A., DELGRAMMASTRO, ROCCO, DIEHL, KATHLEEN, AS EXECUTRIX OF THE ESTATE OF JOHN M. DILLENSCHNEIDER, DECEASED, DOMAROTSKY, WANDA A., DREGAR, FRANK A., EBY, ROBERT J., FAY, AMANDA, FLINN, MARTHA, FLOOD, THOMAS E., FRAZIER, CORNELIUS, JR., GERACE, MARY, GUOKAS, ROSE T., HABINA, MARY F., HICKMAN, JAMES, JONES, ROBERT H., KELLY, PEARL, KLEIN, JOSEPH J., LINDER, ELIZABETH D., MARUCCI, AUGUSTINE, MCGOWAN, JAMES, MCNALLY, ELIZABETH A., MORRIS, JOHN, MUMBOWER, JOHN, MYERS, ANNA M., MYERS, AGNES M., NEFF, JOHN A., PAPALA, GRACE MARY, PETRICCIONE, ANNA, PHILLIPS, RICHARD M., RALLS, RUSSELL, RAYSICK, FLORENCE, RONAU, DANIEL J., RUSSELL, BERNARD C., RUSSELL, JOHN V., RUSSELL, MARGARET, SANTOLERI, ANTHONY, STANOWITCH, WALTER J., STEIN, MADELINE T., STEINMETZ, JOHN F., STILLWELL, BEATRICE L., SMITH, MARIE, SWALLOW, NANCY, WATTS, WILLIAM J., WEISS, ANTOINETTE W., WILLIAMS, CLIFFORD W., WILLIAMS, ROBERT, UMSTETTER, FRANK, VENTI, MARIE, WOLLNER, JAMES C., BARLOW, BRIDGET,

Appendix—Judgment of the Court of Appeals Directing Entry of Summary Judgment.

vs.

GOULD, INC. and FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA, Individually and as Trustee of the GOULD INC. PENSION TRUST FOR HOURLY EMPLOYEES and PENSION BENEFIT GUARANTY CORPORATION,

Gould, Inc., and First Trust Company of St. Paul, Minnesota,

Appellants.

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 78-2365).

Present: ALDISERT and WEIS, *Circuit Judges*; and RE, *Chief Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on August 4, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered December 4, 1981, be, and the same is hereby reversed and the cause remanded to the said District Court which is directed to enter summary judgment in favor of the defendants. Costs taxed against appellees.

ATTEST:
M. ELIZABETH FERGUSON
Chief Deputy Clerk

September 2, 1982.

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

Court of Appeals' Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1118

ADAMS, Robert J., *et al.*,

vs.

GOULD, INC., *et al.*,
Gould, INC., *et al.*, *Appellants.*

(E.D. Pa. Civ. No. 78-2365)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and RE, *Chief Judge*.*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

BY THE COURT,
ALDISERT
Judge

Dated: SEP 27 1982

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.